Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

No. 02-1290

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal entity whose immunity has been waived by Congress can be sued as a "person" under the federal antitrust laws given that "person" includes "corporations and associations existing under or authorized by the laws of . . . the United States," 15 U.S.C. § 7 (2003), and that this Court previously has held that foreign, state, and local governments fall within the statutory definition of "person" under the antitrust laws?

CORPORATE DISCLOSURE STATEMENT

Respondent, Flamingo Industries (U.S.A.) Ltd. does not have a parent company and there is no parent or publicly held company owning 10% or more of the corporation's stock.

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STATEMENT

Flamingo Industries and its owner, Arthur Wah, (collectively "Flamingo") filed suit against the Postal Service for antitrust and other injuries stemming from the Postal Service's termination of a contract with Flamingo to produce U.S. mail sacks. Plaintiffs alleged that the Postal Service attempted to suppress competition and create a monopoly in mail sack production by procuring cheaper mail sacks manufactured in Mexico. The district court granted the Postal Service's motion to dismiss, reasoning in relevant part that Congress did not intend to impose antitrust liability on the Postal Service. Pet. App. 23a-24a.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the federal antitrust laws apply to federal entities whose immunity has been waived by Congress: "Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the word 'person,' . . . wherever used in [Title 15 of the United States Code]." Pet. App. 11a. Indeed, the court noted that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." Pet. App. 10a. The court stated that the Postal Service nonetheless could assert "conduct-based" immunity from antitrust liability if it acted "at the direction of a federal sovereign." Pet. App. 13a.

ARGUMENT

Petitioner Postal Service contends that Congress, by waiving the Postal Service's sovereign immunity under the Postal Service Reorganization Act (PRA), intended the Postal Service nonetheless to remain immune from the reach of the Sherman Act. It argues that the court of appeals's decision below conflicts with this Court's decisions in United States v. Cooper Corp., 312 U.S. 600 (1941), and FDIC v. Meyer, 510 U.S. 471 (1994), as well as with various decisions of the courts of appeals. Moreover, it charges that allowing the Postal Service to be sued under the antitrust laws will expose the Postal Service to unwarranted damages, which could undermine its mission to deliver mail service at reasonable rates.

Petitioner's arguments are unpersuasive for a number of reasons. First, petitioner's efforts to depict a conflict with this Court's prior decisions and those from the courts of appeals are miscast. Second, petitioner's policy arguments against additional liability cannot be reconciled with Congress's very premise in waiving the Postal Service's immunity. Finally, there is no need for this Court to resolve the Sherman Act question at the present time – the court of appeals adopted a conduct-based immunity test to protect the Postal Service from Sherman Act liability if its acts stem from a Congressional mandate; the Postal Service ultimately may escape all liability in the trial court; and even if the Postal Service is held liable, it can seek this Court's review at that time.

1. The decision below is consistent with United States v. Cooper Corp., FDIC v. Meyer, and with prior courts of appeals's decisions.

This Court in Cooper held that Congress did not intend to include the United States within the term "person" as used in the antitrust laws. 312 U.S. at 606. Rather, "in common usage, the term 'person' does not include the sovereign." Id. at 604. This Court went on to note that in each place in the statute where the term "person" is used,

"it is obvious that while the term 'person' may well include a corporation, it cannot embrace the United States." Id. at 607. Courts of appeals, accordingly, have held that federal agencies also do not fall within the statutory term "person." See Sea-Land Serv. Inc. v. Alaska R.R., 659 F.2d 243 (D.C. Cir. 1981) (Alaska Railroad and its supervising United States agencies); Jet Courier Servs., Inc. v. F. Reserve Bank of Atlanta, 713 F.2d 1221 (6th Cir. 1983) (Federal Reserve Banks); Rex Sys., Inc. v. Holiday, 814 F.2d 994 (4th Cir. 1987) (Department of the Navy); Greenwood Utils. Commn. v. Miss. Power Co., 751 F.2d 1484 (5th Cir. 1985) (Southeastern Power Administration); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680 (7th Cir. 1980) (Army and Air Force Exchange Service).[1]

This Court, however, has never held that the statutory term "person" excludes government entities that Congress has determined can "sue and be sued" just like any "corporation[] and association[] existing under or authorized by the laws of . . . the United States." 15 U.S.C. § 7. Indeed, Congress intended in the PRA to place the Postal Service on an equal footing with private corporations and associations, and the language of the Sherman Act covers "corporations and associations existing under or authorized by the laws of . . . the United States." Id.

The court of appeals's commonsense decision below that a governmental entity that Congress has determined can sue and be sued falls within the Sherman Act's definition of "person" in no way conflicts with Cooper. In addition, the court's decision below creates no split within the circuits. Petitioner cited no court of appeals

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[1]Petitioner also argues that a conflict arises with the appellate decisions in Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000), and in Greenwood Utils. Commn., 751 F.2d 1484. Pet. App. 10. In neither case, however, was the immunity of a federal instrumentality at stake. Rather, the question was whether a private entity could claim immunity because it was acting on behalf of the sovereign.

decisions that held the Postal Service immune from suit under the antitrust laws. Moreover, no court of appeals has held that the statutory definition of "person" excludes all governmental entities that can sue and be sued.

To be sure, a number of courts of appeals have held that governmental instrumentalities do not fall within the statutory term "person." For instance, the D.C. Circuit in Sea-Land reasoned that there was no evidence that Congress intended to treat government agencies or instrumentalities, such as the Alaska Railroad and its supervising federal agencies in that case, any differently from the United States itself. 659 F.2d at 246. No lower court, however, has focused on (or even discussed) whether a governmental entity that Congress has determined can sue and be sued should similarly be immune from suit or rather should be considered a corporation or association "existing under or authorized by the laws of . . . the United States." 15 U.S.C. § 7.[2]

To the contrary, this Court has directed that the statutory terms "corporation[]" and "association[]" be construed broadly. In Pfizer v. Government of India, this Court held that the term "person" as defined under the Sherman Act included a foreign nation and therefore permitted the Government of India to maintain a suit. 434 U.S. 308 (1978). This Court noted that "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning," and that "the Sherman and Clayton Acts did not create a 'hard and fast rule of exclusion' of governmental bodies." Id. at 312, 316 (citation omitted). This Court has further held that states must be considered

[2] Of the decisions raised by petitioner, only Jet Courier involved a governmental entity, the Federal Reserve Bank, that Congress had determined could sue and be sued. Significantly, the plaintiff in that case apparently did not argue that Congress's waiver of the Federal Reserve Bank's immunity suggested that Congress would have intended the Federal Reserve Bank to be considered a "person" within the meaning of the Sherman Act. 713 F.2d 1221.

persons, e.g. Georgia v. Evans, 316 U.S. 159, 162-163 (1942), as must municipalities, e.g. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906).[3] And, this Court in Cooper stressed that "person" should be construed the same whether the government sues as a plaintiff or is sued as a defendant: "It is hardly credible that Congress used the term 'person' in different senses in the same sentence." 312 U.S. at 606. The statutory term "person," therefore, comfortably covers a governmental entity whose immunity has been waived by Congress.

Viewed another way, Cooper instructs that "person" does not include the sovereign because courts will not conclude that Congress has waived sovereign immunity unless it does so specifically. Once unmistakable evidence of a waiver exists, however, there is no longer any reason to construe "person" unnaturally to exclude governmental entities. This Court has counseled "that such sue-and-be-sued waivers are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." Meyer, 510 U.S. at 480 (citation omitted). If "person" covers foreign governments, state governments, and municipalities, then it includes federal governmental entities that Congress has directed can sue and be sued. No conflict with Cooper exists.

Petitioner's argument that the court's decision below conflicts as well with Meyer is even more strained. This Court in Meyer held that Congress's decision to waive the immunity of a governmental instrumentality, **in that case the Federal Savings and Loan Insurance Corporation**, did not automatically expose that agency to Bivens v. Six Unknown Named F. Narcotics Agents, 403 U.S. 388 (1971) claims. Meyer, 510 U.S. at 472. Rather, a court must

[3] The Court has also determined that a labor union falls within the statutory term "person." United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922).

determine "whether the source of substantive law upon which the claimant relies provides an avenue for relief." 510 U.S. at 484.

Unlike in Meyer, in the instant case "the source of substantive law upon which the claimant relies," the Sherman Act, plainly affords respondents a cognizable cause of action. Id. As long as the Sherman Act includes governmental entities for which Congress has waived immunity, then the approach dictated in Meyer is satisfied. As the court of appeals stated: "The source of substantive law upon which Flamingo relies is federal antitrust law." Pet. App. 8a. Thus, petitioner's assertion that the court of appeals's decision is inconsistent with Meyer is unpersuasive – the key question rather, is whether a governmental entity for which Congress waived immunity falls within the statutory definition of "person."

2. The court below persuasively determined that "person" in the Sherman Act includes governmental entities that Congress determined can sue and be sued.

The court of appeals as a matter of first impression correctly decided that Congress intended "person" in the Sherman Act to include an entity for which Congress has waived its immunity. Given that Congress explicitly decided to include corporations and associations within the ambit of 15 U.S.C. § 7, it logically intended governmental entities that can sue and be sued generally to stand on the same footing as these private entities.

The court of appeals persuasively relied upon Franchise Tax Bd. of Cal. v. United States Postal Service, 467 U.S. 512 (1984), and Loeffler v. Frank, 486 U.S. 549 (1988), for its conclusion. In Franchise Tax Bd., this Court held that Congress waived the Postal Service's immunity from state administrative orders to withhold monies that its employees owed to the state taxing authority. 467 U.S. 512. Citing FHA, Region No.4 v. Burr, 309 U.S. 242 (1940), this Court explained that

> [w]e start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. . . . [W]hen Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied.

467 U.S. at 517. Indeed, apparently there was no dispute that the Postal Service fell within the statutory term "person" under the California Unemployment Insurance Code. See id. at 522.

In reaching its decision, this Court specifically noted that Congress in passing the PRA "indicated that it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." Id. at 519-520. This Court stressed that "we must presume that the Service's liability is the same as that of any other business." Id. at 520. As the Fourth Circuit later stated in Global Mail Ltd. v. United States Postal Service, "the language and the legislative history of the PRA make clear that Congress intended USPS to be a full-fledged competitor in the business of carrying letters, parcels and packages, and USPS has fulfilled that intention by competing head-to-head with a host of private courier services." 142 F.3d 208, 215 (1998). Given Congress's overall intent to create parity between the Postal Service and other businesses, it would be incongruous to conclude that Congress wished to launch the Postal Service into competition with entities such as Federal Express or United Parcel Service ("UPS") with respect to express mail and other services, and yet immunize the Postal Service from the same antitrust constraints that promote competition amongst its competitors. Nor is it likely that the Postal Service's liability would be "the same as that of any other business" if it could conspire to set prices or engage in other means of restraining competition without fear of the antitrust laws. Franchise Tax Bd., 467 U.S. at 512. Thus, this Court's admonition in Franchise Tax Bd. that "we believe Congress intended

the Postal Service to be treated similarly to other self-sustaining commercial ventures" holds true here as well. Id. at 525-526.

This Court's decision in Loeffler stands for the same proposition. There, in upholding an award of pre-judgment interest against the Postal Service in a Title VII case, this Court added an additional argument as to why the PRA should be construed to have effected a broad waiver of immunity. This Court pointed to the specific exceptions that Congress had grafted on to the sue-and-be-sued clause to limit the Postal Service's liability. Loeffler, 486 U.S. at 561-562. For instance, section 409 of the PRA provides that "the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States" is involved should also apply in suits against the Postal Service despite the general waiver. Moreover, Congress directed that tort claims be brought against the Postal Service in conformance with the procedures and limitations set out under the Federal Tort Claims Act, irrespective of the sue-and-be-sued clause. Id. When Congress, therefore, wanted to ensure continued limited liability for the Postal Service, it was careful to carve out explicit exceptions. In light of the special rules governing venue, tort claims, and the like, the lack of any reference to the Sherman Act strongly suggests that no such limitation to the general waiver was intended. Congress rather "intended the Postal Service to be treated similarly to other self-sustaining commercial ventures" and subject to the antitrust provisions of the Sherman Act. Franchise Tax Bd., 467 U.S. at 525.

Prior to the PRA, Congress passed a multitude of statutes imposing new responsibilities and liabilities on individuals, corporations, and other entities. Some, like the Sherman Act, direct that all "persons" be liable, including corporations organized under the laws of the United States. Others designate a more discrete set of defendants. In enacting the broad waiver in the PRA, it would have been impracticable for Congress to scrutinize the language in the countless statutes and specify whether the Postal Service should be

subject to suit in each one. That is why this Court previously has counseled that

> if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.

Loeffler, 486 U.S. at 554 (quoting FHA, 309 U.S. at 245).

No such reasons for caution even have been suggested here. Preventing the Postal Service from anti-competitive behavior would further, not hinder, Congress's intent that the Postal Service compete on an equal footing with entities such as Federal Express and UPS. Moreover, there has been no showing that imposing anti-competitive restraints would lead to "grave interference with the performance of a governmental function." Id. As further noted below, the court of appeals was careful to state that the Postal Service would still enjoy immunity from antitrust claims where anti-competitive behavior stemmed from legislative direction, as for the monopoly on the carriage of U.S. mail. Pet. App. 13a.

Indeed, far from creating a split among the circuits, the Ninth Circuit's decision is consistent with prior appellate decisions addressing the status of governmental entities that Congress has directed can sue and be sued. For instance, in Global Mail, the Postal Service argued, much as it does here in the context of the antitrust laws, that the Lanham Act did not reach the Postal Service's conduct, despite the PRA's sue-and-be-sued clause. 142 F.3d 208. At that time, the Lanham Act permitted suit against all "persons" including

"organizations capable of being sued." 15 U.S.C. § 1127.[4] The Postal Service asserted that the Lanham Act did not allow suit against it because "the Act's definition of 'person' as an 'organization capable of being sued' falls short of the standard of explicitness required for such a waiver." Global Mail, 142 F.3d at 216. But the Fourth Circuit rejected that argument, reasoning "that a federal agency whose sovereign immunity has been waived . . . [and is] engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'" Id. The Sixth Circuit subsequently agreed with that reasoning, adding "[w]e cannot conclude that Congress intended § 409(c) simultaneously to 'launch [USPS] into the commercial world' and also to immunize USPS from liability for federally-created commercial torts such as the Lanham Act." F. Express Corp. v. U.S. Postal Serv., 151 F.3d 536, 543 (1998) (citation omitted in original). Such a reading would be wholly inconsistent with Congress's stated purpose in enacting the PRA. See also U.S. v. Q Intl. Courier, Inc., 131 F.3d 770, 775 (8th Cir. 1997). Congress's waiver in the PRA was intended to subject the Postal Service to the same rules of the game played by its competitors.

In short, the court of appeals below persuasively concluded that Congress intended that the Postal Service be amenable to suit under the Sherman Act, just like its competitors. The broad language of the waiver in the PRA, Congress's care in crafting exceptions to the waiver, Congress's underlying intent, and the language of the Sherman Act all support that conclusion.

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[4]The Lanham Act since has been amended to codify Global Mail and include the United States specifically within terms of the statute. 15 U.S.C. § 1127 (2003). Petitioner's citation to the Lanham Act reflects the amended version. Pet. App. 6.

3. This court may await further developments in the courts of appeals before deciding whether to resolve this issue given that there is no split among the courts of appeals and no tangible harm to petitioner.

Finally, this Court need not resolve the Sherman Act issue at the present time for three reasons. First, the court below recognized that the Postal Service would continue to be protected by a "conduct-based immunity." Pet. App. 13a. According to the court, the Postal Service cannot be sued for carrying out its legislative mandate, but only for acts contrary to legislative will that are anti-competitive. When the Postal Service exercises a monopoly authorized by Congress, no liability can lie. However, if, for example, the Postal Service conspires with UPS to hold down prices on next day mail, creates an illegal tying arrangement, or conspires to prevent competition in production of mail sacks in the absence of Congressional authorization, then no immunity would attach. Liability in such contexts would protect the public and further Congress's goal in the PRA to make the Postal Service more efficient. Consequently, petitioner's assertion that the court's decision "could undermine the ability of the Postal Service to carry out its legislative mandate" is unfounded, Pet. App. 5, for the court's decision below may, in fact, enhance the Postal Service's responsiveness to Congressional will. Petitioner argues nonetheless that the conduct-based immunity might be too porous to protect its interests. Petitioner's speculation is just that – the Ninth Circuit may well apply the conduct-based immunity in a way entirely solicitous of the Postal Service's legitimate interests. This Court has applied a conduct-based immunity in the past to ensure that legislatively-directed conduct is protected. Cf. Parker v. Brown, 317 U.S. 341 (1943).

Second, no award has been made against the Postal Service in this case. The Postal Service may well prevail at trial, obviating this Court's need to resolve the statutory construction issue at this time.

Third, even if respondents prevail, the Postal Service could re-file a petition for certiorari and, at that time, the Ninth Circuit's application of conduct-based immunity would be more ripe for review. Given that there has been no damages award against the Postal Service and given that there is no split in the circuits, this Court should await further developments in the lower courts before determining whether to resolve the statutory construction issue posed here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 2003